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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DEL MONTE CORPORATION,

Plaintiff and Respondent,

v.

SHEPARD BROS., INC.,

Defendant and Appellant.

A111056

(San Francisco County  
Super. Ct. No. C-03-422083)

Shepard Bros., Inc. (Shepard Bros.) timely appeals from the trial court's order denying its request for attorney fees after Shepard Bros. prevailed at trial in an action brought against it by Del Monte Corporation (Del Monte). We reverse.

**BACKGROUND**

**A. *Complaint***

The facts are not in dispute. On July 3, 2003, Del Monte filed a complaint for damages arising from Shepard Bros.' sale to Del Monte of Surfactant BC-19 (BC-19), used as a de-foaming agent in Del Monte's peach processing operations. Del Monte alleged that after it began using the BC-19 purchased from Shepard Bros., its quality assurance testers detected an "unacceptable, off-flavor" in the peaches processed with the BC-19 purchased from Shepard Bros. The affected peaches were not suitable for sale, Del Monte alleged, so it withdrew all affected product from distribution. Del Monte also alleged the taste or merchantability of its peaches would not have been affected in this manner if the BC-19 sold to it by Shepard Bros. had been a "food-grade" product. Further, Del Monte alleged it

had received and relied upon representations and assurances from Shepard Bros.' personnel the BC-19 product was "food grade."

For its first cause of action, Del Monte alleged breach of contract as follows: "Shepard Bros. made two sales of BC-19 to Del Monte, on or about July 29, 2002, and on or about August 9, 2002. Del Monte issued purchase orders for both sales that, combined with Shepard Bros.' shipment of the goods, constitute valid and binding contracts of sale between the parties. True and correct copies of Del Monte's purchase orders are attached hereto as Exhibits A and B and are incorporated by reference herein. [¶] Shepard Bros. breached the contracts with Del Monte in that the BC-19 product sold by Shepard Bros. to Del Monte was not "food grade" as represented by Shepard Bros. and was not suitable for use in Del Monte's peach processing operations. [¶] Del Monte fully performed its obligations under the contracts with Shepard Bros.. [¶] As a direct and proximate result of Shepard Bros.' breaches, Del Monte has sustained and will continue to sustain damages of at least \$5.6 million, with the exact amount of damages to be determined at trial."

The copies of Del Monte's purchase orders attached to the complaint as Exhibits A and B both comprise a one-page, signed, purchase-authorization order, and a separate printed page containing "Del Monte Terms and Conditions" (T&C). The T&C contain various warranties, including one at paragraph seven, which states: "Seller warrants that the articles and materials furnished under the Order will comply with specifications, are fit for the purpose intended . . . [and] free from defects in materials or workmanship." Also, paragraph nine of the T&C states: "Acceptance of this Order shall constitute an agreement upon Seller's part to indemnify and hold Buyer . . . harmless from all liability, loss, damage and expense, *including reasonable counsel's fees*, incurred or sustained by Buyer . . . by reason of the failure of goods to conform to the warranties in this Order."

As well as cause of action (1) for breach of contract, Del Monte's complaint alleged causes of action 2-7 as follows: (2) breach of Shepard Bros.' express warranty the BC-19 was "food grade"; (3) breach of Shepard Bros.' implied warranty of fitness for a particular purpose, based on Shepard Bros.' knowledge Del Monte intended to use the BC-19 for peach-processing; (4) negligent misrepresentation, based on Shepard Bros.' representations

the BC-19 was “food grade”; (5) negligence, based on Shepard Bros.’ breach of its duty of care to observe reasonable commercial standards of fair dealing by representing the BC-19 was “food grade” and suitable for Del Monte’s intended use; (6) unfair competition under Business and Professions Code section 17200 (section 17200), based on Shepard Bros.’ conduct in inducing Del Monte to purchase BC-19 that was not “food grade”; and, (7) unfair, deceptive, untrue, or misleading advertising pursuant to section 17200, based on Shepard Bros.’ representations its BC-19 was “food grade.” In addition to compensatory damages of at least \$5.6 million, Del Monte prayed for incidental and consequential damages, restitution, and for “costs of suit and reasonable attorney’s fees as permitted by law.”

In its answer, Shepard Bros. pleads the affirmative defense of negation of express warranties, stating, “[D]efendant alleges that in the sale of goods to plaintiff, defendant excluded, modified, or negated any express warranties.” This affirmative defense was based on a “no warranties” provision contained in the invoices which accompanied its July and August 2002 shipments of BC-19 to Del Monte. This provision stated: “Shepard Bros. warrants that all products listed on this invoice [] will conform to . . . specifications . . . . All other warranties, express or implied, . . . are hereby excluded and the rights and remedies of customer provided are exclusive . . . . Customer’s exclusive remedy for breach of this warranty . . . is to receive a replacement of such product and in no event shall seller be liable for any special, indirect, consequential or contingent damage.”

### ***B. Trial and Judgment***

Trial commenced on January 19, 2005. During deliberations, the jury sent out a question concerning the “no warranties” provision in Shepard Bros.’ invoices. The trial court responded to the jury question as follows: “I instruct you that there is no evidence that Del Monte did accept those terms and conditions. Accordingly, I instruct you that none of those terms and conditions became part of the contract that the parties made. [¶] On a related topic, about which you did not ask, but with which you may be concerned as you deliberate, different Exhibits . . . contain the reverse side of the purchase orders Del Monte issued. Similarly, I instruct you that there is no evidence that Shepard Bros. did accept

those terms and conditions. Accordingly, I instruct you that none of those terms and conditions became part of the contract that the parties made. Therefore, you shall not consider the terms and conditions set for [sic] on the reverse side (page 2) of any of those documents.”

On February 18, 2005, the jury returned a special verdict. Regarding Del Monte’s negligence claim, the jury found Shepard Bros. was negligent; its negligence was a substantial factor in causing harm to Del Monte, and Del Monte’s damages were \$735,949. The jury also found Del Monte was negligent, its negligence was a substantial factor in causing its harm, and Del Monte was 90% at fault, Shepard Bros. 10% at fault.

Regarding Del Monte’s breach of express warranty claim, the jury found that in the discussions or negotiations which resulted in the contract of sale, Shepard Bros. stated the BC-19 was food grade. The jury also found the BC-19 was food grade. Regarding Del Monte’s claim for breach of implied warranty, the jury found Shepard Bros. did not “know or have reason to know that Del Monte intended to use some quantity of BC-19 in the liquid placed in the Scholle bins with the chilled diced peaches.”

Regarding Del Monte’s claim for negligent misrepresentation, the jury found Shepard Bros. represented to Del Monte the BC-19 was food grade, and this representation was not false. The jury also found Del Monte failed to make reasonable efforts to mitigate its damages, and that, had it done so, it could have avoided \$735,949 in damages. Judgment was entered on February 18, 2005, decreeing “the net award of damages to Del Monte is an amount of \$0.”

***C. Shepard Bros.’ Motion to Determine Party Prevailing on the Contract and to Fix Amount of Attorney Fees Awarded as Costs***

Shepard Bros. filed its motion on March 18, 2005. Shepard Bros. argued it was entitled to attorney’s fees under Civil Code section 1717 (§ 1717)<sup>1</sup>. Shepard Bros. stated

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<sup>1</sup> Civil Code section 1717 states: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the

Del Monte sued to enforce the terms and conditions of its purchase orders, which included recovery of its attorney fees. Because § 1717 provides for mutuality of remedy, Shepard Bros. contended it was entitled to attorney fees as the prevailing party. Del Monte countered the trial court ruled neither the terms and conditions in Del Monte's purchase orders, nor the "no warranty" provision in Shepard Bros.' sales invoice, were part of the sales contract between the parties. Accordingly, Del Monte argued the BC-19 sales contract did not contain an attorney fee provision, and Del Monte would not have been entitled to attorney fees even if it had prevailed on its breach of contract claim. Thus, Del Monte concluded, Shepard Bros. was not entitled to attorney fees under § 1717.

The trial court heard argument on the motion on May 4, 2005. On May 19, 2005, the trial court issued its ruling on the motion. The trial court noted no evidence was offered at trial Shepard Bros. was aware of the attorney fee provision in the T&C included in Del Monte's purchase orders. Indeed, the trial court observed Del Monte's T&C were "plainly inconsistent" with the "no warranty" provision in Shepard Bros.' sales invoices. The trial court continued: "Under the rule set forth in California Commercial Code Section 2207, neither of the sets of "reverse side" terms is effective because of that inconsistency between them, and the parties are bound only by the terms actually agreed to and such additional terms as the law supplies. The resulting terms of the contract the parties made for the purchase and sale of BC-19 do not allow attorney fees to either party or to the prevailing party." The trial court concluded Shepard Bros. could not recover attorney's fees because, although "a contract of sale of the BC-19 was proven," the court had determined the contract did not contain any provision for an award of attorney's fees in the event of breach. Therefore, although the trial court determined Shepard Bros. was the prevailing party for purposes of an award of costs under Code of Civil Procedure section 1033.5, subdivision (a), the court found Shepard Bros. was "not entitled to be paid any of its attorney fees."

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party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (§ 1717, subd. (a).)

## DISCUSSION

“[T]o determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [contract], and the facts are not in dispute, such review is conducted de novo. [Citation.] Thus, it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo. [Citation.]” (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) Here, we will review the legal determination made by the trial court under a standard of de novo review

The parties agree the issue is governed by the principles established in *Reynolds Metals Company v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds Metals*). *Reynolds Metals* teaches that mutuality of remedy under § 1717 is designed to protect against “oppressive use of one-sided attorney’s fees provisions,” so that if plaintiff is contractually entitled to attorney fees if plaintiff prevails on a breach of contract claim, then defendant is entitled to attorney fees if defendant successfully defends such a claim. (See *Reynolds Metals, supra*, 25 Cal.3d at p. 128.) Thus, “the *Reynolds Metals* test . . . requires a party claiming attorney fees to establish that the opposing party actually would have been entitled to receive them if the opposing party had prevailed.” (*Sessions Payroll Mgmt. Inc. v. Noble Construction Co., Inc.* (2000) 84 Cal.App.4th 671, 681 (*Sessions*).)

Courts have consistently applied the principles articulated in *Reynolds Metals* to uphold mutuality of remedies under section 1717. In *Berge v. International Harvester Company* (1983) 142 Cal.App.3d 152, Gloria Berge sued International Harvester Company (IH) for damages arising from breach of warranties on a sale of a truck manufactured by IH. (*Id.* at p. 156.) In a cross-complaint, IH Credit Corporation (IHCC) sued Berge for damages incurred in repossessing the truck after Berge defaulted on payments. (*Ibid.*) IHCC requested attorney’s fees based on a clause in Berge’s retail sales contract allowing recovery of attorney’s fees in the event of a dispute. (*Id.* at p. 163.) The trial court granted a nonsuit for Berge on IHCC’s cross-complaint based on evidence IHCC transferred the repossessed

truck and the sales contract back to IH, which reimbursed IHCC for all its expenses. (*Id.* at pp. 163-164.) The trial court denied Berge’s subsequent request for attorney’s fees: it reasoned section 1717 was inapplicable because “IHCC’s cause of action was not in fact founded ‘on a contract’ ” since IHCC had transferred the contract to IH before filing suit against Berge. (*Id.* at p. 164.)

The Court of Appeal reversed. It stated; “This result cannot be sustained. Quite clearly, IHCC based its claim against Berge on its right under the sales contract. Had IHCC prevailed, its recovery would have been based on the contract and would have included attorney’s fees. Berge, however, defended herself successfully. To effectuate the legislative intent underlying section 1717, she must be awarded attorney’s fees as the prevailing party. The section protects consumers against one-sided attorney’s fees clauses which could otherwise be used to force settlements of unmeritorious claims. [Citation.] This protection is available to the consumer *even if he succeeds in defending himself on the theory that there was no enforceable contract to begin with.* ‘[A]s long as the action here involved a contract it was ‘on a contract’ and within Civil Code, section 1717.’ [Citations.]” (*Berge v. International Harvester Co., supra*, 142 Cal.App.3d at pp. 164 -165 [italics added].)

Another case upholding section 1717’s principle of mutuality is *North Associates v. Bell* (1986) 184 Cal.App.3d 860. There, the court of appeal affirmed an award of attorney’s fees to North Associates after it successfully sued Robert Bell in an unlawful detainer action for unpaid rent and possession of the property North Associates had leased to Bell. (*Id.* at p. 861.) On appeal, Bell argued the court erred in awarding attorney’s fees to North Associates under section 1717 “because the only attorney fees provision in any written agreement between the parties was the reciprocal attorney fees clause in the March 1981 lease, which the trial court determined expired or was terminated on March 14, 1982. Bell contend[ed] that because the trial court found a new contract was created between the parties by virtue of their correspondence and other memoranda, there is no attorney fees provision to form the basis for an award of attorney fees.” (*Id.* at p. 864.)

The Court of Appeal noted that “numerous appellate decisions have applied section 1717 to award attorney fees to prevailing parties even in situations where the contract

containing the attorney fees provisions is unenforceable, rescinded, or nonexistent, or where the party sued on a contract is actually a nonsignatory [citing cases].” (*North Associates v. Bell, supra*, 184 Cal.App.3d at p. 865.) The court observed: “Here, North brought suit on a written lease agreement containing an attorney fees provision; Bell defended by alleging that he had been granted extensions under the same written lease. Had Bell been successful in making this defense, he would have been entitled to attorney fees under the original lease. North prevailed in the lawsuit, although the trial court found that the original lease had expired and a new lease had taken its place by virtue of the exchanged memoranda and conduct of the parties. It would be inequitable to deny attorney fees to North, the prevailing party, when Bell would have been entitled to an award of attorney fees had he prevailed under the same facts. In short, Bell’s contention in his pleadings and at trial that his continued occupancy of the subject premises was under an extension of the original lease, which lease provided for attorney fees for the prevailing party in any dispute thereon, provides ample justification for the trial court’s award of attorney fees to North, even though the court found that the original lease was no longer in effect at the time of Bell’s eviction.” (*Id.* at pp. 865-866, fn. omitted.)

Indeed, in *Hsu v. Abbata* (1995) 9 Cal.4th 863, our Supreme Court acknowledged: “It is now settled that a party is entitled to attorney fees under section 1717 ‘even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney’s fees had it prevailed.’ [Citations.] [¶] This rule serves to effectuate the purpose underlying section 1717. As this court has explained, ‘[s]ection 1717 was enacted to establish mutuality of remedy where [a] contractual provision makes recovery of attorney’s fees available for only one party [citations], and to prevent oppressive use of one-sided attorney’s fees provisions.’ [Citations.] The statute would fall short of this goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed. To achieve its goal, the statute generally must apply in favor of the party prevailing on a contract claim whenever that party

would have been liable under the contract for attorney fees had the other party prevailed.” (*Id.* at pp. 870-871.)

Applying section 1717’s principle of mutuality of remedy to the facts here, we first note Del Monte, in its complaint, alleged its purchase orders, combined with Shepard Bros.’ shipment of the goods, formed valid and binding contracts of sale. Del Monte also claimed Shepard Bros. breached those contracts by selling BC-19 which was unsuitable for use in Del Monte’s peach processing operations because it was not food grade. Second, if Del Monte had succeeded on those claims, it would have been entitled to attorney fees under the provision in its T&C allowing it to recoup counsel’s fees as part of any loss it incurred through the failure of goods to conform to warranties. Third, as the trial court correctly concluded, it was Shepard Bros., rather than Del Monte, who prevailed on the breach of contract claim.<sup>2</sup> Therefore, in light of the authorities discussed above, we conclude Shepard Bros. is entitled to attorney’s fees under section 1717’s principle of mutuality of remedy. (See, e.g., *Reynolds Metals*, *supra*, 25 Cal.3d at p. 129.)

Del Monte contends the above authorities are inapplicable because, as the trial court ruled, the attorney fee provision in its purchase order was inconsistent with Shepherd’s sales invoice and so was never incorporated into the sales contract. We have no reason to doubt the trial court’s application of California Commercial Code Section 2207, and in fact neither party challenges the trial court’s ruling in that regard.<sup>3</sup> But that does not change the fact that

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<sup>2</sup> “The prevailing party determination is to be made only upon final resolution of the contract claims and only by ‘a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.’ [Citation.]” *Hsu v. Abbata*, *supra*, 9 Cal.4th at 876.) There is no question here Shepard was the prevailing party because the jury expressly found the BC-19 sold by Shepard was food grade, and Del Monte does not challenge that finding on appeal.

<sup>3</sup> For example, according to Witkin: “Conduct of both parties which recognizes the existence of the contract is sufficient [citation], even though their writings do not otherwise establish a contract. [Citations.] The contract consists of the ‘terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.’ (U.C.C. 2207(3).)” (4 Witkin, Summary (10th ed. 2005) Sales, § 34, at p. 47.)

by its action Del Monte sought to enforce a contract containing a one-sided attorney fee provision.<sup>4</sup> And if Del Monte had persuaded the trial court its purchase orders constituted the contract, Del Monte would have been entitled to its reasonable attorney fees had it prevailed on its breach of contract claim. Indeed, the trial court acknowledged at least one scenario under which Del Monte might have prevailed on its contract theory.<sup>5</sup> While the trial court ultimately determined the sales contract did not contain the terms initially asserted by Del Monte, we do not see how that distinguishes this case from those where “a party is entitled to attorney fees under section 1717 . . . ‘when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney’s fees had it prevailed.’” *Hsu v. Abbata, supra*, 9 Cal.4th at p. 870.)

Del Monte also asserts that in determining whether section 1717 applies, courts look to the “actual contract” and not to the pleadings, and suggests Shepard Bros.’ claim for attorney fees is actually based on estoppel. We agree a party may not be subjected to mutuality of remedy under section 1717 merely because the complaint contains a “bare allegation” she is entitled to attorney’s fees. (See *Leach v. Home Savings & Loan Association* (1986) 185 Cal.App.3d 1295, 1307 [defendant not entitled to attorney fees under section 1717 because, even if plaintiff had prevailed on her action to remove a cloud on title to real property, she had “no independent right to recover fees” under the promissory note and deed of trust].) But unlike *Leach*, Del Monte made more than a “bare allegation” it was entitled to attorney’s fees. Rather, Del Monte sued to enforce contracts, which it

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<sup>4</sup> Del Monte does not contend the provision in its T&C is not a true attorney fee provision. (Cf. *Myers Building Industries Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 975 (*Myers*) [concluding “contract provisions at issue constitute provisions for indemnity against third party claims and not attorney fee provisions within the meaning of Civil Code Section 1717.”] (*Id.* at p. 962.)

<sup>5</sup> The trial court observed: “If for example, Del Monte’s purchase order had been admitted into evidence, but the Seller’s invoice had not because it was not properly authenticated, and if there was some evidence that Del Monte’s terms had been accepted, the attorney fee provision could have been part of the agreement made by the parties, and under Section 1717 of the Civil Code, enforceable by the prevailing party.”

attached and incorporated into the complaint by reference, permitting it to recover reasonable attorney's fees had it succeeded in that claim.<sup>6</sup> (Cf. *Jones v. Drain* (1983) 149 Cal.App.3d 484, 487 ["In considering the question of the clarity of the entitlement to attorney's fees we must decide whether this issue is to be resolved based upon the pleadings or based upon the evidence. We believe that the issue must turn on the pleadings"].)

We also agree with Del Monte an award of attorney's fees pursuant to section 17171 may not be based on estoppel theory. (See *Sessions, supra*, 84 Cal.App.4th 671.) In *Sessions*, the court "reject[ed] the estoppel theory as a basis for imposing an attorney fee award." (*Id.* at p. 682.) The court stated: "We have concluded that Sessions, a nonsignatory suing as a third party beneficiary, could not show that the parties to the contract intended to include Sessions within the scope of the contractual attorney fee clause. Therefore Sessions had no independent right to recover attorney fees under the contract. *What Sessions' complaint alleged does not alter that conclusion.* Sessions could not have enforced the right to claim attorney fees as a contractual benefit even if Sessions had prevailed on its third party beneficiary cause of action as to damages it claimed from Noble. Therefore the trial court erroneously awarded attorney fees against Sessions and in favor of Noble." (*Ibid.* [italics added]; see also *Myer, supra*, 13 Cal.App.4th at p. 962, fn. 12 [prevailing party has no right to attorney's fees by estoppel where losing party requested attorney's fees but "would not *actually* have been entitled to attorney fees under the contract" had losing party prevailed [italics in original].) But in contrast to *Sessions* and *Myers*, Shepard Bros. does not rely on an estoppel theory. As we've already noted, Shepard Bros. relies on contracts, sued upon by Del Monte and incorporated into Del Monte's

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<sup>6</sup> Nor are we are persuaded by Del Monte's contention it "abandoned" its contract claim and proceeded to trial on a warranty claim alone. We need not decide today whether a party who sued on a contract theory would be absolved from section 1717 liability for attorney fees if it unequivocally withdrew such a claim early on in the proceedings. Any "abandonment" by Del Monte, according to the record before us, was not manifested until the jury sent out a question during deliberations, by which time Shepard had been forced to defend a breach of contract claim for \$5.6 million in damages all the way to trial.

complaint, which would have provided Del Monte with reasonable attorney's fees had Del Monte successfully enforced those contracts against Shepard Bros.

For two reasons, we also reject Del Monte's contention Shepard Bros. is not entitled to attorney's fees under section 1717 because Shepard Bros. prevailed on a breach of warranty claim, not a breach of contract claim. In the first place, the trial court neither considered this argument nor ruled upon it. "It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal." (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.) Second, even if not waived, the argument fails on the merits. Del Monte relies on *Covenant Mutual Insurance Company v. Young* (1986) 179 Cal.App.3d 318 (*Covenant*), for the proposition section 1717 does not apply to breach of warranty claims. *Covenant* is entirely inapposite. The core issue in *Covenant* is whether a prevailing defendant is entitled to attorney fees under Civil Code section 3318 (section 3318) when it successfully defends against plaintiff's claim for breach of the warranty of authority under that statute. (*Covenant, supra*, 179 Cal.App.3d at pp. 320-321.) The court of appeal held only plaintiff is entitled to attorney's fees under section 3318, and rejected the idea section 3318, like section 1717, imposes reciprocity of fee provisions. (*Id.* at pp. 321-324.) In any case, whether an action arises out of the contract for purposes of section 1717 "depends upon the nature of the right sued upon, not the form of the pleading or the relief demanded. If based on breach of promise it is contractual; if based on breach of a noncontractual duty it is tortious. If unclear the action will be considered based on contract rather than tort. In the final analysis we look to the pleading to determine the nature of plaintiff's claim." (*Kangerlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178-1179 [breach of fiduciary duty arose out the contract to execute escrow, so prevailing plaintiff was entitled to attorney's fees under section 1717 where the escrow contract gave the escrow company the right to attorney's fees is a party failed to pay escrow costs].) Here, Del Monte's complaint clearly sounds in contract. Each of Del Monte's causes of action, even including its negligence claim, is founded upon the breach of an alleged promise by Shepard Bros. to provide food grade BC-19.

In sum, “the *Reynolds Metals* test . . . requires a party claiming attorney fees to establish that the opposing party actually would have been entitled to receive them if the opposing party had prevailed.” (*Sessions, supra*, 84 Cal.App.4th at p. 681.) Shepard Bros. has established Del Monte sought to enforce contracts containing an attorney fee provision, and that had Del Monte successfully enforced those contracts against Shepard Bros. it would have been entitled to its attorney fees. No more is required under section 1717. Thus, Shepard Bros. is entitled to its attorney’s fees as the prevailing party on Del Monte’s breach of contract claim.

### **DISPOSITION**

The judgment is reversed for further proceedings consistent with this opinion. Del Monte to pay costs on appeal.

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Parrilli, Acting P. J.

We concur:

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Pollak, J.

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Siggins, J.